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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 1027

OTIS ELEVATOR COMPANY,

*Petitioner,*

*v.*

LOCAL 453, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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OTIS ELEVATOR COMPANY,

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*v.*

LOCAL 453, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Otis Elevator Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on February 27, 1963.

### Citations to Opinions Below.

The opinion and order of the District Court denying the respondent's motion for a preliminary injunction is printed in Appendix A hereto, *infra*, p. 10, and is reported at 201 F. Supp. 213. The opinion and order of the District Court granting summary judgment to the petitioner (R. 12a-14a) is printed in the Appendix filed with the court below, nine copies of which are being filed with this peti-

tion, and is reported at 206 F. Supp. 853. The opinion of the Court of Appeals (R. 15a-23a), printed in Appendix B hereto, *infra*, p. 20, is reported at 314 F. 2d 25.

## Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on February 27, 1963 (R. 24a; p. 29, *infra*.) The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

## Question Presented.

Should the courts enforce an arbitration award that directs an employer to reinstate an employee who engaged in gambling activities in the plant and during working hours, in violation of both a plant rule and a state penal law, and who was discharged after conviction of the state law violation.

## Statute Involved.

Section 301(a) of the Labor Management Relations Act, 61 Stat. 156 (1947), 29 U. S. C. Section 185(a) (1958), reads as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

## Statement.

Petitioner ("Otis") operates a plant in Yonkers, New York, at which a well publicized rule has been in effect for many years prohibiting gambling in the plant and making the penalty therefor "immediate discharge." Calise, an employee at the Yonkers plant and a member of the respondent (the "Union"), was arrested late in December 1959 for gambling in the plant, after having been under surveillance for several weeks by an investigator from the office of the District Attorney of Westchester County. He was subsequently indicted, and on December 1, 1960 he was convicted after trial in the County Court of Westchester County on two counts of knowingly possessing "policy" slips in the plant on December 28 and 29, 1959.

From the date of his arrest to the date of his conviction almost a year later, Otis took no disciplinary action against him, being unwilling to prejudge his guilt. On December 5, 1960, after Calise had been convicted, had been sentenced to a fine of $250 or to imprisonment in the Westchester County Penitentiary for thirty days, and had paid the fine, Otis discharged him. At the time of the discharge, there was in effect between Otis and the Union a collective bargaining agreement covering the Yonkers plant. The agreement gave Otis "the right to discharge any employee for just cause" and gave the Union the right to "challenge the propriety of the discharge of any employee." The agreement also established a grievance procedure and provided for the arbitration of grievances not settled. The agreement made the decision of the arbitrator "final and binding upon the parties" but expressly withheld from him "the power to add to, subtract from, or modify the terms" of the agreement.

The Union challenged the discharge of Calise, the grievance was not settled by the parties under the grievance machinery and the dispute was submitted by the Union to arbitration. Calise did not testify at the arbitration hearing, and the arbitrator found (R. 5a) that it was clear that he did not deny his guilt. The arbitrator further found that Calise had violated the plant rule forbidding gambling and that he had been convicted of a crime as a result of his conduct, but nevertheless held that the discharge had not been for "just cause" (R. 1a). He concluded that, although disciplinary action was appropriate, discharge was in his judgment too harsh. He therefore directed, in an award dated May 24, 1961, that Calise be reinstated by Otis on July 3, 1961, but without pay for the period from the date of his discharge to the date fixed for his reinstatement.

The Union thereafter brought this action in the United States District Court for the Southern District of New York to confirm the arbitration award and to compel compliance therewith. In that action, the Union moved for a preliminary injunction compelling compliance with the arbitration award pending final disposition of the action. This motion was denied in all respects, on the ground that the award is "void and unenforceable" as contrary to public policy. (Appendix A, *infra*, p. 18; 201 F. Supp. 213) The Union thereafter moved for summary judgment. The District Court denied that motion and, in the absence of any issue of fact, granted summary judgment to Otis. (R. 12a-14a; 206 F. Supp. 853) On appeal by the Union, the Court of Appeals for the Second Circuit reversed the judgment of the District Court with instructions that an order issue compelling Otis to comply with the terms of the arbitration award. It held that the decision of the arbitrator "must be taken as conclusively establishing as a matter of contract interpretation that the discharge of Calise was not for just

cause and as foreclosing judicial review of the merits of the question." (R. 21a; Appendix B, p. 25; 314 F. 2d, at 28) It also held that "there is no federal policy" inhibiting enforcement of the award of reinstatement. (R. 22a; Appendix B, p. 27; 314 F. 2d, at 29)

## Reasons for Granting the Writ.

1. The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Textile Workers Union* v. *American Thread Co.*, 291 F. 2d 894, on the issue of whether an arbitrator may substitute his own judgment for that of the employer as to the appropriateness of disciplinary action. The Court in the *American Thread* case refused to enforce an arbitration award that directed the reinstatement, with loss of one week's pay, of an employee who had been discharged by the company for improper performance of his duties. The Court of Appeals in the present case (R. 20a; Appendix B, *infra*, p. 25; 314 F. 2d 25, 28) conceded that "the scope of an arbitrator's authority is not unlimited", citing *American Thread*, but reached the opposite conclusion and enforced the arbitration award after referring to "the terms of the contract and of the submission in the present case, underscored by the rule" of *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, and *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574. There is no meaningful difference, however, between the two cases insofar as the terms of the contracts and submissions are concerned; and the Court of Appeals for the Fourth Circuit was fully aware of *American Mfg.* and *Warrior* in reaching its decision, and repeated this Court's admonition in the companion case of *United Steelworkers* v. *Enterprise Wheel*

*& Car Corp.*, 363 U. S. 593, 597, that an arbitrator is without authority to "dispense his own brand of industrial justice." (291 F. 2d, at 900) The two decisions are in direct conflict on the question of whether an arbitrator, acting under the common form of arbitration provision, is authorized to vary the measure of discipline applied for cause that has been established and is reasonable.

2. The decision below conflicts in principle with decisions of this Court, the Court of Appeals for the Fourth Circuit, the New York Court of Appeals and the California Supreme Court. In *Southern Steamship Co. v. NLRB*, 316 U. S. 31, this Court refused to enforce a Labor Board order directing the reinstatement of seamen who went on strike in response to their employer's unfair labor practices, because the strike also constituted mutiny within the meaning of the Criminal Code. The Board, although explicitly authorized by statute to require the reinstatement of such discharged employees, was admonished by this Court not to pursue the purposes of the Act it administers to the exclusion of other facets of national policy. Earlier, in *NLRB* v. *Fansteel Corp.*, 306 U. S. 240, a Labor Board order for the reinstatement of unfair labor practice strikers was denied enforcement because the strikers had engaged in a sit-down that constituted an illegal seizure of their employer's plant. In *Hurd* v. *Hodge*, 334 U. S. 24, restrictive covenants in real estate deeds, although valid as between the parties, were denied enforcement in the courts as contrary to the public policy of the United States. In *Glendale Mfg. Co.* v. *Garment Workers*, 283 F. 2d 936, cert. denied, 366 U. S. 950, an arbitration award directing an employer to bargain with a union after its decertification by the Labor Board was set aside because its enforcement would have been contrary to national labor policy.

The highest courts of two states have refused to enforce arbitration awards that seemed to them to run counter to public policy. *Matter of Western Union Telegraph Co.*, 299 N. Y. 177, 86 N. E. 2d 162; *Black* v. *Cutter Laboratories*, 43 Cal. 2d 788, 278 P. 2d 905, cert. dismissed, 351 U. S. 292. The *Western Union* case involved employees who had illegally refused to handle telegraph messages from or to other companies at which a strike was in progress. The *Cutter Laboratories* case involved an employee discharged for Communist Party membership and activity that the California Supreme Court found was condemned by state policy.

The cases cited above proceeded upon the principle that judicial process should not be used to compel or condone conduct that is illegal or that is contrary to public policy. The decision below seems to recognize that principle and expressly finds that "there is a public policy which condemns gambling by an employee on the premises of his employer" (R. 22a; Appendix B, p. 26; 314 F. 2d, at 29), but nevertheless compels the reemployment of the discharged employee. It seeks to justify the result on the ground that the public policy against gambling has been vindicated by the criminal conviction and fine and the seven-month layoff without pay. In *Fansteel*, however, the sit-down strikers were also given fines and jail sentences, but this Court nevertheless refused to enforce the Labor Board order directing their reinstatement. In *Southern Steamship* and in *Western Union*, similarly, the illegal conduct of the discharged employees was subject to criminal penalties, but the courts there nevertheless also refused to compel reemployment.

The conflict between the result of the decision below and the principle of the cases cited is as true of the state cases cited as of the federal cases. While the enforce-

ment of arbitration provisions in collective bargaining agreements is now a matter of federal law, *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, state courts have concurrent jurisdiction in such cases, *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, although they must apply federal law, *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95. There is no reason to suppose that, until this Court has settled the issue, the views expressed in *Western Union* and in *Cutler Laboratories* will be changed because it is now federal law that is to be applied. On the contrary, one lower state court decision handed down since this Court's decision in *Lincoln Mills* refused to enforce an arbitration award of reinstatement as contrary to public policy in a case almost identical with this one. *Avco Corp.* v. *Preleska*, 22 Conn. Super. 475, 174 A. 2d 684.

3. The question presented is clearly important in the developing field of federal labor law. Perhaps the largest single category of labor arbitration cases is that involving issues of discharge and discipline.[1] Whether, under the usual form of arbitration agreement, the arbitrator is completely free to substitute his own judgment for that of the employer in determining the appropriate penalty once the stated reason for it has been found to exist is therefore a practical and continuing problem. Not infrequently, the reason for discipline or discharge is illegal or criminal conduct on the part of the employee affected,[2] and

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[1] The American Arbitration Association in its annual report for 1962, *Arbitration News*, No. 3-1963, states that "Discharge and discipline cases still ranked first, insofar as numbers are concerned", in the 3842 labor arbitration cases administered by it in that year.

[2] E.g., *Mansfield Tire & Rubber Co.*, 31 L. A. 775; *Penn-Dixie Cement Corp.*, 29 L. A. 451; *Glasgow-Adrian Co.*, 25 L. A. 614; *Certain-Teed Products Corp.*, 24 L. A. 606; *Republic Steel Corp.*, 23 L. A. 808; *Sherwin-Williams Co.*, 22 L. A. 1; *Quaker Oats Co.*, 15 L. A. 42.

recent arbitration awards indicate that in-plant gambling is not an uncommon form of such conduct.[3] The question raised by the decision below is therefore likely to arise with some frequency in the future, and the way in which it is decided will undoubtedly affect the functioning of the labor arbitration system so strongly endorsed by this Court in the *Steelworkers* cases. It is in the public interest to have that system function well and therefore to have a question affecting its operation settled by this Court.

## Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, April 17, 1963.

Respectfully submitted,

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[3] *Lockheed Aircraft Corp.*, 37 L. A. 188; *Haskell Mfg. Co.*, 33 L. A. 174; *Publishers' Association of New York City*, 32 L. A. 44; *Advertiser Publishing Co.*, 32 L. A. 26; *Sun Drug Co.*, 31 L. A. 191.

## Appendix A.

**Opinion and Order of the District Court for the Southern District of New York, denying respondent's motion for a preliminary injunction.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

LOCAL 453, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, an Unincorporated Labor Organization,

Plaintiff,

v.

OTIS ELEVATOR COMPANY, a Corporation,

Defendant.

61 Civ. 3362

APPEARANCES:

ABRAMSON & LEWIS, New York City, for plaintiff. (Leonard Greenwald, New York City, of counsel.)

GUGGENHEIMER & UNTERMYER, New York City, for defendant. (Louis Newman, New York City, of counsel.)

### Opinion.

MACMAHON, *District Judge*.

This is a motion by a union, pursuant to Rule 65, Federal Rules of Civil Procedure, for a preliminary injunction to compel an employer to comply with an arbitration award reinstating an employee discharged for violation of a com-

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pany rule prohibiting gambling. The employee had been convicted for the knowing possession of policy slips upon the employer's premises during working hours. The main action seeks permanent enforcement of the award together with damages. Jurisdiction is grounded on the Labor-Management Relations Act, 29 U. S. C. A. § 185, and the United States Arbitration Act, 9 U. S. C. A. § 9.

Injunctive relief before trial on the merits should be granted most sparingly. A strong showing of a reasonable probability of success in the main action and irreparable injury are indispensable prerequisites to the granting of such a drastic remedy. This is especially so where, as here, a preliminary injunction would not merely preserve the *status quo pendente lite*, but grant the party seeking it a substantial part of the ultimate relief obtainable after a successful trial. *Securities and Exchange Commission* v. *Capital Cities Research Bureau, Inc.*, Docket No. 26042 (2 Cir., December 18, 1961); *Speedry Products, Inc.* v. *Dri Mark Products, Inc.*, 271 F. 2d 646, 648 (2 Cir. 1959). The court must, therefore, appraise the merits of this controversy to determine whether the union is entitled to the extraordinary equitable relief it seeks.

There is no dispute that a company rule prohibited gambling on the employer's premises under penalty of immediate discharge. Admittedly, the employee was discharged for violation of that rule following his indictment, prosecution, and conviction in the County Court of Westchester County for knowing possession of policy slips on the employer's premises during working hours. The union challenged "the propriety" of the employee's discharge, and after exhaustion of grievance procedures under a collective bargaining agreement, the parties submitted the dispute to arbitration.

Following hearings, the arbitrator found that the employee had knowingly violated the plant rule against gambling, and, as a result, had been convicted of a crime.

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Nevertheless, and despite the absence of evidence indicating any other reason for the discharge, the arbitrator concluded that the employee had been discharged without just cause. As he saw it, the employee's misconduct called for disciplinary action, but discharge was too harsh a penalty in view of the hardship inflicted on the employee's wife and four children, his seniority, good record, punishment by the authorities, and the lack of any disciplinary action against four other employees whom the arbitrator, but not the authorities, felt were guilty of the same offense. Accordingly, he directed the company to reinstate the employee without back pay from the date of discharge.

The union contends that the award should be enforced because the arbitrator acted within the scope of his power under his honest interpretation of the collective bargaining agreement. The employer argues, however, that the award is unenforceable because the arbitrator exceeded his power by making a compromise decision that the employee's concealed misconduct warranted suspension, but not discharge.

The threshold problem is whether the court has any business at all reviewing the merits of the arbitrator's decision, however bizarre or wrong it may be. Ordinarily, parties to an arbitration agreement will not be heard to complain about the result, if they have received what they bargained for. As a general rule, an arbitrator's decision is not open to judicial review, unless he has exceeded his power by deciding a matter not arbitrable under the contract or the submission. *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

The initial question, therefore, is whether these parties did agree to arbitrate the dispute involved. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*,

*supra*. Accordingly, we must look to the terms of the collective bargaining agreement, and the stipulated question submitted for arbitration, to ascertain exactly what rights these parties designed for themselves, and whether the arbitrator acted within the scope of the power delegated to him.

The applicable provisions of the collective bargaining agreement are set forth in the margin.* The agreement gives the employer "the right to discharge any employee for just cause." The union, however, has "the right to challenge the propriety of the discharge" as a grievance. "All differences, disputes or grievances between the parties that shall not have been settled" by the grievance procedure "may be submitted to arbitration", and in such case, the decision of the arbitrator "shall be final and binding upon the parties but the arbitrator shall not have the power to add to, subtract from, or modify the terms" of the agreement.

When exhaustion of the grievance procedure failed to settle this dispute, the parties stipulated that the question for the arbitrator to decide was: "Has Joseph Calise been discharged for just cause, and if not what shall the remedy be?"

The agreement does not define what conduct constitutes "just cause" for discharge. Nor does it lay down any criteria governing "the propriety" of a discharge once

* Article IX provides:

"Section 11. The Employer shall have the right to discharge any employee for just cause. The Union shall have the right to challenge the propriety of the discharge of any employee, except a probationary employee, and any such discharge shall be considered a grievance to be dealt with in accordance with the grievance procedure heretofore set forth in Article V. Employees discharged without just cause shall receive pay for all lost time unless an arbitrator rules otherwise."

the union lodges a grievance. Neither of the quoted terms has any definite meaning. Both are vague, general and flexible. They confer general rights, but neither the parties, nor the draftsmen, have troubled to tell us, or the arbitrator, exactly what those rights are, other than the right to differ about what constitutes "just cause" for discharge.

That both parties intended to leave room for differences of views about the matter is clear from the very fact that they expressly left ultimate resolution of disputes about it to an arbitrator unfettered with rigid criteria. Undoubtedly, certainty of meaning was consciously rejected in recognition of a need for flexible standards to facilitate *ad hoc* solution of each dispute on its own facts to promote the paramount objective of industrial peace. Obviously when this dispute arose, both parties so construed the agreement, otherwise there was no point whatever in submitting anything to arbitration, for there was not the slightest question about the misconduct involved. Yet, they freely stipulated that the arbitrator should decide whether the employee had "been discharged for just cause, and if not what shall the remedy be?" Words could hardly make clearer the arbitrator's power to decide the only real dispute, that is, whether the conceded misconduct was just

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Article V provides various steps for negotiating grievance settlements, and Article VI provides:

> "Section 1. All differences, disputes or grievances between the parties that shall not have been settled after following the procedure set forth in Article V, may be submitted to arbitration upon notice of either party to the other party. . . .
>
> Section 2. The decision of such arbitrator shall be final and binding upon the parties but the arbitrator shall not have the power to add to, subtract from, or modify the terms of this Agreement, or any Agreement supplemental thereto. . . ."

cause for discharge, or whether milder disciplinary action was more appropriate.

Lest doubt remain as to who should have the last word on any differences that might conceivably arise as to what the parties intended by the general terms employed, the agreement expressly empowers the arbitrator to make a final and binding decision on "All differences, disputes or grievances" between the parties. Surely such a plenary grant carries power to interpret the contract. It also brings into play the rule requiring that all doubt as to an arbitrator's power to settle a dispute should be resolved in favor of coverage. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra*, at 582-583.

The employer argues, however, relying on *Textile Workers Union of America* v. *American Thread Co.*, 291 F. 2d 894 (4 Cir. 1961), that when the union challenges a discharge for lack of just cause, the arbitrator's power is limited, under the terms of both the agreement and the submission, to deciding whether the employee was in fact discharged for just cause, or for some other reason. Otherwise, the employer urges, the right to discharge for just cause is no right at all, but an illusory opportunity to chance the outcome of arbitration. These arguments are plausible and, indeed, might have validity if the agreement had defined "just cause" or provided that violation of a company rule would be sufficient, or if the stipulation had focused the issue on whether the alleged misconduct had in fact occurred, rather than on whether it constituted "just cause" for discharge, or some other remedy.

The court must take the agreement and the stipulated submission as the parties made them. Both squarely put the question of what constitutes "just cause" for discharge up to the arbitrator. We think it plain, therefore, that the collective bargaining agreement, read with the question submitted, does empower the arbitrator to settle the dispute involved.

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The employer urges, nonetheless, that the commission of a crime by an employee upon the employer's premises is just cause for discharge as a matter of law. Of course, it is. *National Labor Relations Board* v. *Federal Bearings Co.*, 109 F. 2d 945 (2 Cir. 1940). Nevertheless, the court is foreclosed from considering that question, for the arbitrator is the last word, even on questions of law, once the parties have granted him final power to decide all differences and disputes between them. *Philadelphia Dress Joint Board* v. *Rosinsky*, 134 F. Supp. 607, 612 (E. D. Pa. 1955), aff'd, 229 F. 2d 438 (3 Cir. 1956); *Carey* v. *Westinghouse Electric Corp.*, 6 App. Div. 2d 582 (1st Dept. 1958), aff'd, 6 N. Y. 2d 934 (1959).

Ordinarily, this would close our inquiry, whether or not we agree with the arbitrator's decision. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, *supra*. Here, however, compelling reasons dictate a different course.

The misconduct involved here was not just an infraction of a company rule. It was a crime. The knowing possession of policy slips was, and still is, a misdemeanor under the law of New York, N. Y. Penal Law 974. The same statute which prohibits possession of policy slips also provides that a "person who . . . is the owner of any place . . . where policy playing or the sale of what are commonly called 'lottery policies' is carried on with his knowledge or after notification that the premises are so used, permits such use to be continued, or who aids, assists, or abets in any manner, is a common gambler, and guilty of a misdemeanor." Responsibility for observance of that aspect of the New York Penal Law rests squarely upon the owner of the premises—the employer. To deny him the power to discharge for the commission of such a crime upon his property exposes him to criminal prosecution.

Furthermore, this was not just a friendly wager. This was organized professional gambling. Calise not only

kept policy slips in his possession, but also had four other employees working for him. Policy, along with bookmaking, is regarded by responsible law enforcement officials, State and federal, as the incubator of most, and more sinister, organized crime.*

These unmistakeable pronouncements of the public policy against organized gambling cannot be lightly brushed aside merely because an arbitrator feels that discharge is too harsh. Were we to do so, the next arbitrator, moved by like compassion, could conclude with equal validity that no crime by an employee, however serious or injurious to the employer, would constitute just cause for discharge.

However inviolable the teaching that courts keep their hands off arbitration awards, arbitrators act under something less than divine right. They are creatures of contract and, like the parties from whom they derive their powers, are not above public law.

Thus, a collective bargaining agreement may well give an arbitrator power to dispense his own brand of indus-

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*In the February 1961 report of the New York State Commission of Investigation, entitled "Syndicated Gambling in New York State," the Chairman had this to say about organized gambling:

> "Syndicated gambling operated by professional criminals is widespread in New York State today. These syndicated gambling activities are the 'treasury of the underworld' or, as I have sometimes described it, 'the bread and butter of organized crime,' and these activities provide fantastic sums which feed and finance other illegal activities such as the narcotics racket, labor racketeering and bootlegging." (p. 114)

In this same report, policy slip operations were particularly condemned:

> "Because policy appeals to the lowest income group and because it necessitates personal contact and volume play between bettors and runners, it is confined to heavily populated areas where organized criminal control is more evi-

trial justice, but the contract, and his power under it, are limited by, and must yield to, overriding public policy. This award clashes with that policy. It indulges crime, cripples an employer's power to support the law, and impairs his right to prevent exposure to criminal liability. The award is, therefore, void and unenforceable. *Black* v. *Cutter Laboratories*, 351 U. S. 292 (1956); *Hurd* v. *Hodge*, 334 U. S. 24, 34-35 (1948); *Matter of Western Union Tel. Co.*, 299 N. Y. 177 (1949); *Acco Corp.* v. *Presteska*, 37 Lab. Arb. 320 (June 30, 1961, Conn. Superior Ct., Fairfield County).

Finally, equity is rooted in conscience. An injunction is an extraordinary remedial process which is granted, not as a matter of right but in the exercise of sound judicial discretion, and, then, only upon a clear showing of irreparable injury. No such injury is shown here.

Balancing the equities in the light of the undisputed facts—the stark absence of any legitimate labor objective,

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dent. As a result, even more than bookmaking, it is regulated by the minions of organized crime." (p. 62).

In the same vein, the Temporary Commission of Investigation of the State of New York, in its "Second Annual Report" of February 1960, characterized organized gambling as "the major law enforcement problem of this State" (p. 76), and in its February 1961 report on the summary of its activities during 1960 concluded "that the best way to cripple organized crime would be to suppress gambling" (p. 25).

Similarly, the federal government has recognized that organized crime depends on organized gambling. Former Attorney General William P. Rogers stated: "The biggest source of money feeding organized crime is that most tolerated of all crimes—gambling." 106 Cong. Rec. 2159. Robert F. Kennedy, the present Attorney General, reiterated the belief that organized racketeering can be curbed most effectively by federal action aimed at eliminating illegal professional gambling. 1961 U. S. Code Cong. & Ad. News, p. 3661. Congress responded by outlawing the interstate communication of wagering paraphernalia. 18 U. S. C. §§1084 and 1953 (added August 1961).

the soiled hands of the beneficiary, and the risk to the employer—, it would be unconscionable to grant extraordinary equitable relief in this sullied cause. Surely equity should not become privy to law-breaking by lending its aid to enforce an arbitration award which blinks realities, indulges crime, and offends public policy. An injunction, in these circumstances, would be tantamount to granting policy operators a license to violate the law and exploit defendant's employees. However enlightened the views of the arbitrator, or loose the rules of industrial justice, it is not the conscience of the Chancellor to fashion such an improvement in the working conditions of those engaged in the numbers racket.

Accordingly, the motion for a preliminary injunction is in all respects denied. This opinion shall constitute the court's findings of fact and conclusions of law. So ordered.

Dated: New York, N. Y.
January 18, 1961

LLOYD F. MACMAHON
U. S. D. J.

## Appendix B.

### Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 227—October Term, 1962

(Argued January 24, 1963 Decided February 27, 1963)

Docket No. 27767

LOCAL 453, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, an unincorporated Labor Organization,

Appellant,

OTIS ELEVATOR COMPANY, a corporation,

Appellee.

Before:

FRIENDLY, KAUFMAN and MARSHALL, *Circuit Judges.*

Appeal by plaintiff union from an order of the United States District Court for the Southern District of New York, Cashin, *J.*, granting summary judgment in favor of defendant employer, the effect of which was to deny enforcement to an arbitration award. 206 F. Supp. 853 (S. D. N. Y. 1962).

Reversed.

IRVING ABRAMSON, New York, N. Y. (Abramson & Lewis, on the brief) (Donald Grody, of counsel), *for Appellant.*

LOUIS NEWMAN, New York, N. Y. (Guggenheimer & Untermyer, on the brief), *for Appellee.*

*Opinion.*

MARSHALL, *Circuit Judge:*

This is an appeal by the plaintiff below, Local 453, International Union of Electrical Workers, from an order entered by the United States District Court for the Southern District of New York, Cashin, *J.*, granting summary judgment in favor of the defendant, Otis Elevator Company. The effect of the order was to vacate, set aside, and deny enforcement to an arbitration award which had directed Otis to reinstate an employee whom it had discharged for violating a company rule prohibiting gambling. The facts underlying the controversy are not in dispute.

Joseph Calise, an employee of Otis who was represented by Local 453, was convicted on December 1, 1960, in the County Court of Westchester County on two counts of knowingly possessing policy slips in the Otis plant in Yonkers on December 28, and 29, 1959, in violation of New York Penal Law § 974, which makes such conduct a misdemeanor. He was fined a total of $250. There was testimony at the trial that four other Otis employees were "working for" Calise in handling policy slips within the plant, but apparently none of the four was prosecuted by the public authorities or disciplined by Otis.

During the eleven months that elapsed between the date of Calise's arrest and the date of his conviction, Otis took no disciplinary action against him and he remained on the job without evidence of further transgression. However, on December 5, 1960, four days after Calise's conviction was entered, he was discharged for violating the company's rule against gambling on its premises during working hours. The union challenged the discharge and after the exhaustion of grievance procedures under the collective bargaining agreement the parties submitted the dispute to arbitration.

The applicable provisions of the collective bargaining agreement gave the employer "the right to discharge any employee for just cause" and the union "the right to challenge the propriety of the discharge of any employee" as

a grievance. The agreement further provided that when an issue was submitted to arbitration, the decision of the arbitrator "shall be final and binding upon the parties." In submitting the present controversy to arbitration, the parties stipulated that the question for decision was, "Has Joseph Calise been discharged for just cause, and if not what shall the remedy be?"

The arbitrator concluded that under all of the circumstances Calise had not been discharged for just cause. He ordered Otis to reinstate Calise to his former position on July 3, 1961, but without back pay or accrual of seniority or other benefits flowing from the collective agreement for the seven-month period of disciplinary layoff, although his prior-accrued seniority and pension rights were to be preserved and not to be affected by the layoff.

The arbitrator made plain that Calise had been guilty of serious misconduct and that his award was in no way to be taken as condoning "such illegal activities as policy numbers gambling." Substantial disciplinary action sufficient to serve as a deterrent would have been permissible, he said, but "outright and final discharge is a disciplinary action with effects too harsh upon the grieving employee." He based his decision upon the facts that Calise had already been punished once for his offense by the public authorities, that he had undergone a seven-month layoff without pay or unemployment compensation, that he had 24 years of unbroken seniority and satisfactory service at the company, that he had "heavy family obligations involving four young innocent children and a wife," that as a result of discharge he would lose considerable pension rights "built up after decades of service," and that the company had not disciplined the four other men who "were guilty also of violating the same rule against gambling in the plant."

The union subsequently brought suit in the United States District Court for the Southern District of New York to confirm the arbitration award and to compel Otis to comply with it, asserting jurisdiction under Section 301

of the Labor-Management Relations Act, 29 U. S. C. A. §185. By an order to show cause, the union moved for a preliminary injunction to compel compliance pending final disposition of the action. The motion was denied by the District Court, MacMahon, *J.*, in an opinion reported at 201 F. Supp. 213 (S. D. N. Y. 1962), on the ground that the arbitrator's award was "void and unenforceable" because violative of an "overriding public policy." The court said that the award "indulges crime, cripples an employer's power to support the law, and impairs his right to prevent exposure to criminal liability." *Id.* at 218.

The union then moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The District Court, Cashin, *J.*, in an opinion reported at 206 F. Supp. 853 (S. D. N. Y. 1962), denied the motion. At the same time, since there was no genuine issue of fact, it exercised its right to grant summary judgment to the defendant, vacating and setting aside the arbitration award, without the filing of a formal cross-motion. See *Local 33, International Hod Carriers Union* v. *Mason Tenders District Council*, 291 F. 2d 496 (2 Cir. 1961); *United States* v. *Closs*, 150 F. Supp. 687 (M. D. Pa. 1957), *affirmed*, 254 F. 2d 590 (3 Cir. 1958); 6 *Moore, Federal Practice* ¶56.12, pp. 2068-89 (2d ed. 1953).

In entering summary judgment for the defendant, Judge Cashin said that he agreed with "Judge MacMahon's determination that the arbitrator had the power to settle the dispute involved. I also agree that this court is foreclosed [by the arbitrator's decision] from considering the question of whether or not the commission of a crime by an employee upon the premises of the employer is just cause for discharge as a matter of law." 206 F. Supp. at 854. But he nevertheless felt bound to deny enforcement to the arbitrator's award.

> "However, as Judge MacMahon found, the misconduct involved here is not just an infraction of a company rule. It is a misdemeanor under §974,

McK. Consol. Laws, c. 40, of the N. Y. Penal Law. This same statute also provides that a 'person who • • • is the owner • • • of any place • • • where policy playing or the sale of what are commonly called 'lottery policies' is carried on with his knowledge or after notification that the premises are so used, permits such use to be continued, or who aids, assists, or abets in any manner, • • • is a common gambler, and guilty of a misdemeanor.' Thus, the responsibility for the observance of this law rests upon the owner of the premises and exposes him to criminal prosecution.

"In the instant case, Calise was not just gambling himself, but he was carrying on organized professional gambling and had four other employees working for him. Under these circumstances I cannot compel the defendant to comply with the arbitration award." *Id.* at 855.

It is from the decision of Judge Cashin that the union has taken this appeal.

The decision of Judge Cashin expressly adopted the conclusions of Judge MacMahon that the grievance that arose between Local 453 and Otis over the discharge of Calise was an arbitrable one and that the arbitrator had the power to settle that dispute involved. These conclusions were clearly correct. The terms of the collective bargaining agreement provide that the employer may discharge an employee for "just cause" and that the union may challenge the "propriety" of a discharge as a grievance. They further provide that the arbitrator shall have the authority to make a "final and binding" decision on all grievances between the parties. The agreement nowhere defines what conduct constitutes "just cause" for discharge or what criteria shall govern the "propriety" of a discharge. That the parties intended to leave such definition to the arbitrator is made plain both by the "plenary grant" of power

made to him, 201 F. Supp. at 217, and by the broad scope of the stipulated question, framed only in terms of "just cause", which accompanied the submission. Although the scope of an arbitrator's authority is not unlimited, *Textile Workers Union* v. *American Thread Co.*, 291 F. 2d 894 (4 Cir. 1961), the terms of the contract and of the submission in the present case, underscored by the rule that courts must uphold the arbitrator in the exercise of the broadest jurisdiction in the absence of specific contractual limitations on that jurisdiction, clearly bespeak arbitrability. *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); Hays, "The Supreme Court and Labor Law, October Term, 1959," 60 Colum. L. Rev. 901, 920 (1960).

Having bargained for the decision of the arbitrator on the question of whether Calise's conduct and criminal conviction constituted "just cause" for discharge, the parties are bound by it, even if it be regarded as unwise or wrong on the merits; "so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 599 (1960). To separate the just causes for discharge from the unjust was precisely what the parties clothed the arbitrator with the authority to do. If the employer wanted the automatic right to discharge an employee for violation of certain company rules or for the commission of certain crimes, whether on or off the company premises, it had the opportunity to seek such an explicit exclusion from the general arbitration clause when the collective agreement was negotiated, as it may do when the collective agreement expires. In the absence of such a clause, the decision of the arbitrator in the present case must be taken as conclusively establishing as a matter of contract interpretation that the discharge of Calise was not for just cause and as foreclosing judicial review of the merits of the question.

Despite his recognition of the force and applicability of these principles, Judge Cashin nevertheless concluded, for the same reasons for which Judge MacMahon had concluded, that the award of the arbitrator was judicially unenforceable because of its repugnance to public policy. The precise nature of the public policy which the award was thought to offend is not made clear by either opinion in the District Court. Apparently the Court was concerned with the fact that the possession of policy slips "is regarded by responsible law enforcement officials, state and federal, as the incubator of most, and more sinister, organized crime," 201 F. Supp. at 218, and with the fact that since an employer is responsible for knowingly permitting policymaking on his premises, "[t]o deny him the power to discharge for the commission of such a crime upon his property exposes him to criminal prosecution." *Id.* at 217. See 206 F. Supp. at 855. We think that the District Court's analysis of the public policy issue was inadequate. Accordingly, we reverse, with instructions that an order issue compelling the employer to comply with the terms of the arbitrator's award.

It is no less true in suits brought under § 301 to enforce arbitration awards than in other lawsuits that the "power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States. * * *" *Hurd* v. *Hodge*, 334 U. S. 24, 34-35 (1948). The public policy to be enforced is a part of the substantive principles of federal labor law which federal courts, under the mandate of *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957), are empowered to fashion. *Cf. Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95 (1962). Thus, when public policy is sought to be interposed as a bar to enforcement of an arbitration award, a court must evaluate its asserted content.

Of course there is a public policy which condemns gambling by an employee on the premises of his employer; it

is a policy expressed by the section of the New York Penal Law which Calise was convicted of violating. But that policy has been vindicated in the present case in the very manner that the State of New York contemplated, by a criminal conviction and the judicial imposition of a penalty. Parenthetically, it may further have been vindicated, beyond any demands of the State of New York, by the seven-month layoff without compensation or accrual of seniority benefits which Calise sustained and which the arbitrator upheld. There is no federal policy that requires greater vindication of the public condemnation of gambling than this. The law is not that Draconian. To enforce the arbitrator's award in these circumstances cannot fairly be looked upon as judicial condonation of Calise's offense.

Moreover, in light of the important role which employment plays in implementing the public policy of rehabilitating those convicted of crime, there can hardly be a public policy that a man who has been convicted, fined, and subjected to serious disciplinary measures, can never be ordered reinstated to his former employment, particularly when the conviction was for his first offense and when the arbitrator found no indication that reinstatement would result in repetition of the illegal activity. Indeed, the arbitrator in effect took into account the importance of rehabilitation when he concluded that the criminal conviction, the sentence imposed as a result of that conviction, and the seven-month layoff without pay or unemployment compensation were appropriate punishment under the circumstances.

The argument, persuasive to the District Court, that reemployment of Calise may subject Otis to prosecution under New York Penal Law § 974 if Calise resumes his criminal activity is open to serious doubt. As one commentator has said in criticizing the result reached by the District Court in the present case, "It is hard to imagine that an employer who had specifically indicated his disapproval of gambling on the premises, had penalized the

employee found guilty, and had warned the employee against any such conduct in the future could be found guilty of violating the statute." Fleming, "Arbitrators and the Remedy Power," 48 Va. L. Rev. 1199, 1209 (1962).

The award of the arbitrator was regular in every respect. There is no substantive principle of federal labor law which authorizes denial of enforcement on the present facts for reasons of public policy. Accordingly, the judgment below is reversed, with instructions that an order issue compelling Otis to comply with the terms of the arbitration award.

Reversed.

## Appendix C.

### Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of February one thousand nine hundred and sixty-three.

Present:

HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
HON. THURGOOD MARSHALL,
*Circuit Judges.*

LOCAL 453, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,
Plaintiff-Appellant,

*v.*

OTIS ELEVATOR COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed, with instructions that an order issue compelling the appellee to comply with the terms of the arbitration award in accordance with the opinion of this court; with costs to the appellant.

A. DANIEL FUSARO
Clerk

Office-Supreme Court, U.S.
FILED
MAY 14 1963
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1962

No. 1027

OTIS ELEVATOR COMPANY,

*Petitioner,*

v.

LOCAL 453, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

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ABRAMSON & LEWIS,
DONALD GRODY,
*of Counsel.*

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IN THE

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*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## BRIEF FOR RESPONDENT IN OPPOSITION

### Question Presented

May a federal court, on the ground that it is offensive to public policy, refuse to enforce the award of an arbitrator which imposes a seven-month suspension but reinstates an employee discharged for gambling upon the premises of the employer and which award was premised upon and submitted to the arbitrator in the following manner:

> "Has Joseph Calise been discharged for just cause and, if not what shall the remedy be?"

## Statement

As a result of the observations of a detective investigator from the office of the District Attorney of Westchester County who posed as an employee of the Petitioner Company for five weeks, one Joseph Calise, a member of Respondent Union, employed by the Company, was convicted on December 1, 1960 in the County Court of Westchester County of knowingly possessing policy slips in violation of New York Penal Law, Sec. 974, a misdemeanor, and fined $250.

For almost a year after the arrest of Calise and the institution of criminal proceedings against him, the Company undertook no disciplinary action against him. However, on December 5, 1960, Calise, an assembler with 24 years seniority, was discharged.

The Union duly grieved and the question was arbitrated before Millard L. Midonick, Esq., presently a judge of the Family Court of the State of New York and formerly a Municipal Court Judge of the City of New York. At the hearing, counsel for the parties stipulated to the following submission: "Has Joseph Calise been discharged for just cause, and if not what shall the remedy be?" (R. 5a). In granting the grievance, the Arbitrator acknowledged the many years of satisfactory service of the grievant, his unbroken seniority, his dependent wife and four children between the ages of 1 and 8, his age 47, and that his rights under the Company Pension Plan would not vest until he attained age 50 while in the Company employ (R. 6a). The Arbitrator also recognized the difficulty and perhaps inability of the grievant to obtain suitable employment if the discharge were permitted to stand. The Company's contentions that gambling on its premises during working hours was just cause for discharge and that failing to uphold the discharge would render nugatory future Company disciplinary action were rejected by Judge Midonick.

In addition to the submission agreement, the Arbitrator took into consideration and set forth in full in his opinion the following provisions of the collective agreement between the parties:

> "Section 2. The decision of such arbitrator shall be final and binding upon the parties but the arbitrator shall not have the power to add to, subtract from, or modify the terms of this Agreement, or any Agreement supplemental thereto . . . ." Article VI.
>
> "Section N. The Employer shall have the right to discharge any employee for just cause. The Union shall have the right to challenge the propriety of the discharge of any employee, except a probationary employee, and any such discharge shall be considered a grievance to be dealt with in accordance with the grievance procedure heretofore set forth in Article V. Employees discharged without just cause shall receive pay for all lost time unless an arbitrator rules otherwise." Article IX (R. 4a-5a).

In consideration of all the above factors, the Arbitrator did not uphold the discharge nor did he order reinstatement from the date thereof. Instead the Arbitrator deemed the period from December 5, 1960 through July 2, 1961 to have been a disciplinary lay-off with loss of seniority and other benefits flowing from the Collective Agreement. In requiring reinstatement as of July 3, 1961, which post-dated Judge Midonick's award, the Arbitrator also took into consideration the fact that four other employees were involved in the same illegal activity for which Calise was convicted, although none of them was subjected to criminal prosecution or discharge. He likewise considered the possibility of harm to the operations of the Company resulting from Calise's reinstatement and found proof thereof absent. (R. 9a; 10a-11a.)

When Petitioner thereafter made clear its intention not to comply with the award of the Arbitrator, the Union

sought, by preliminary injunction, to compel compliance. Such relief was denied by MacMahon, D. J. in 201 F. Supp. 213 and the Union then moved for summary judgment upon the same grounds. That motion was denied by Cashin, D. J., whose opinion is reported at 206 F. Supp. 853, reciting in pertinent part that:

> "In the instant case, Calise was not just gambling himself, but he was carrying on organized professional gambling and had four other employees working for him. Under these circumstances I cannot compel the defendant to comply with the arbitration award." (R. 14a)

The District Court then quotes verbatim from the opinion of Judge MacMahon the following:

> "* * * A collective bargaining agreement may well give an arbitrator power to dispense his own brand of industrial justice, but the contract, and his power under it, are limited by, and must yield to, overriding public policy. This award clashes with that policy. It indulges crime, cripples an employer's power to support the law, and impairs his right to prevent exposure to criminal liability. The award is, therefore, void and unenforceable. Black v. Cutter Laboratories, 351 U. S. 292 (1956); Hurd v. Hodge, 334 U. S. 24, 34-35 (1948); Matter of Western Union Tel. Co., 299 N. Y. 177 (1949); Avco Corp. v. Presteska [174 A. 2d 684 (Conn. 1961)]." (Ibid.).

An appeal was then prosecuted to the Court of Appeals for the Second Circuit from the judgment entered by Judge Cashin. The appellate court ruled unanimously in material part as follows:

> "* * * Judge Cashin nevertheless concluded, for the same reasons for which Judge MacMahon had concluded, that the award of the arbitrator was judicially unenforceable because of its repugnance to public policy. The precise nature of the public policy which the award was thought to offend is not made clear by either opinion in the District Court."

(R. 21a; Appendix B to Petitioners Certiorari Brief, p. 26; 314 F. 2d 25).

* * *

"The award of the arbitrator was regular in every respect. There is no substantive principle of federal labor law which authorizes denial of enforcement on the present facts for reasons of public policy. Accordingly, the judgment below is reversed, with instructions that an order issue compelling Otis to comply with the terms of the arbitration award." (Id. at 23a; id. at p. 28).

## Reasons for Denying the Writ

1. The decision of the Fourth Circuit in *Textile Workers Union* v. *American Thread Co.*, 291 F. 2d 884, cited by Petitioner as evidence of a conflict between circuits, is inapposite. The court below cited *Textile Workers* appropriately for the proposition that "an arbitrator's authority is not unlimited", holding however, that in the case at hand "the terms of the contract and of the submission * * * clearly bespeak arbitrability." (R. 20a; Appendix B of Petitioner, p. 25). Indeed Judge MacMahon's opinion in the District Court as to the limitation of the Arbitrator's authority disposed of Petitioner's reliance upon *Textile Workers* as follows:

> "The court must take the agreement and the stipulated submission as the parties made them. Both squarely put the question of what constitutes 'just cause' for discharge up to the arbitrator. We think it plain, therefore, that the collective bargaining agreement, read with the question submitted, does empower the arbitrator to settle the dispute involved." (Appendix A of Petitioner, p. 15).

*Textile Workers* dealt with a specific limitation imposed upon the arbitrator by the agreement, and did not, as here, involve in addition to the contractual grant of powers, a specific mandate to determine whether or not the grievant

had been discharged for cause and, if not, then leave to the arbitrator the task of fashioning an appropriate remedy.

Even assuming, which we do not, that the Fourth Circuit's decision in *Textile Workers* is out of step with the mainstream of national labor policy as enunciated by this Court, the mere assertion of a party, disgruntled by a particular arbitral award, that the arbitrator exceeded his authority, does not create a conflict between circuits.

There is nothing even approaching a conflict between circuits and there exists, on that basis, no reason for granting the writ.

2. Though the issue which Petitioner seeks to present to this Court arises within the framework of the enforcement, pursuant to Section 301 of the Labor Management Relations Act, of an arbitral award, wherein the parties voluntarily contracted for the adjudication of disputes by a third party, it nonetheless relies greatly upon cases which arise in some other context. For example, in both *Southern S. S. Co.* v. *NLRB*, 316 U. S. 31 and *NLRB* v. *Fansteel Corp.*, 306 U. S. 240, cited by Petitioner, this Court refused to enforce Board orders which were contrary to supervening statutory or *decisional* criteria. In those cases, this Court was faced with the task of reconciling the statutorily-based responsibility of the Board with other well-defined statutory or decisional guidelines. Similarly, the racially restrictive covenants sought to be upheld in *Hurd* v. *Hodge*, 334 U. S. 24 and *Shelley* v. *Kraemer*, 334 U. S. 1, were denied enforcement here in the first (a federal case) because of the well-pronounced contrary public policy of the United States as exemplified by R. S. 1978, and in the other (a state case) because it ran afoul of the equal protection guaranty of the Fourteenth Amendment.

An arbitration award directing the parties to bargain in *Glendale Mfg. Co.* v. *Garment Workers*, 283 F. 2d 936, cert. denied 366 U. S. 950, was properly denied enforcement

because it directly clashed with an NLRB order whereby a union was decertified. The rationale is elementary: the Board has primarily responsibility on the question of unit determinations and its findings may not be lightly regarded by either courts or private parties.

*Western Union Telegraph Co.* v. *American Communications Assn., CIO*, 299 N. Y. 177, the leading New York case on the refusal of the judiciary to enforce arbitral awards which are contrary to public policy, is distinguishable, *inter alia*, on the grounds that the Federal Communications Act and the Penal Law of the State of New York forbade the very conduct which was sought by the union therein to be vindicated by means of the arbitration process. No such result is sought or has been achieved here. The conduct of Calise has been roundly condemned on all sides—by union counsel, by the arbitrator, by the Westchester County Court, by the Federal Courts. Indeed, for his misdeeds he has been punished in at least two temporal forums. The enforcement of Judge Midonick's award is therefore not contrary to any known public policy. In this respect, there is no need to elaborate upon the opinion of Judge Marshall below.

However much we may disagree with the substantive merit of this Court's dismissal of the appeal in *Black* v. *Cutler Laboratories*, 351 U. S. 292 (1956), the State of California had apparently established to the satisfaction of this Court that its own State legislative enactments made the continued private employment of an alleged communist a subject not susceptible of enforcement in an arbitral proceeding, for this Court explicitly held that "the decision involves only California's construction of a local contract under local law, and therefore no substantial Federal question is presented." *Id.* at 299.

Along the same lines, but we concede, not distinguishable from the case at bar, is *Avco Corp.* v. *Prostoka*, 174

A. 2d 684 (Conn. Super. Ct. 1961), which is almost at one with the instant case. The distinguished arbitrator, whose award was refused enforcement by the Connecticut court, was Paul R. Hays, Esq., presently a Judge of the Second Circuit Court of Appeals. The decision of the Superior Court was manifestly erroneous, and regrettably the Court of Errors and Appeals did not pass on the question. This decision of the Connecticut Superior Court, then, is the sole *authority* upon which Petitioner can rely here.

3. The public policy considerations have been well considered by the Court below and have been found wanting. Whether we apply federal law (*Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448) or state law not incompatible therewith (*Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95; *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502), Petitioner has not shown, nor cannot show, but for the *Presteska* case, a principle or a decision upon which it can rely for the proposition that the reemployment of a convicted gambling misdemeanant is contrary to or forbidden by public policy.

## CONCLUSION

**For all these reasons, the petition for a writ of certiorari should not be granted.**

Dated, May , 1963.

Respectfully submitted,

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